No. 88-431

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

COMMUNITY FEDERAL SAVINGS AND LOAN ASSOCIATION,

Petitioner,

vs.

DIRECTOR OF REVENUE, STATE OF MISSOURI, et al.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

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QUESTIONS PRESENTED

1. Does the failure of the respondent, Director of Revenue, to return moneys paid by petitioner under an unconstitutional state statute violate the due process and takings provisions of the Fifth and Fourteenth Amendments to the United States Constitution?

2. Does the Fourteenth Amendment equal protection clause prevent the respondent from retaining petitioner's tax payments when the state action thereby distinguishes between those savings and loan associations which either never paid the tax or will receive refunds under statutory provisions and those which paid the taxes when allegedly due but which are unable to obtain statutory refunds?

3. Do procedural due process requirements vitiate the effectiveness, for purposes of beginning the period in which appeals of administrative decisions must be filed, of a notice mailed to a corporate entity and not to its counsel, who was well known to respondent to be representing petitioner at the time?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were: the petitioner Community Federal Savings and Loan Association and two savings and loan associations that merged into it after litigation began, First Federal Savings and Loan Association of Moberly and Carondelet Savings and Loan Association; respondent the Director of Revenue, State of Missouri; and intervenors-respondents School District of Kansas City, Missouri, Reorganized School District No. 7, of Jackson County, Missouri (Lee's Summit), and North Kansas City School District, of Clay County, Missouri. The case was consolidated for purposes of appeal to the Supreme Court of Missouri with the case of *Mutual Savings and Loan Association v. Director of Revenue, State of Missouri*, but that case did not present the issues that are discussed in this petition, so Mutual Savings and Loan Association is not named as a party herein.

Petitioner Community Federal Savings and Loan Association has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1 other than Com Fed Funding Corporation, a subsidiary corporation.

TABLE OF CONTENTS

QUESTIONS PRESENTED I
LIST OF PARTIES II
OPINIONS BELOW 1
JURISDICTION 2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3
STATEMENT OF THE CASE 3
REASONS FOR GRANTING THE WRIT 7

I. Taxpayers are entitled to the return of moneys required to be paid by an unconstitutional state statute under the protections provided under the Fifth and Fourteenth Amendments to the United States Constitution even when they do not qualify for a statutory refund for failure to meet state procedural requirements 7

A. The failure to return the moneys is so unfair and confiscatory that it violates the due process and taking provisions of the Fifth and Fourteenth Amendments 7

B. The failure to return the moneys creates two classes of taxpayers for purposes of the "taxes" illegally collected by the State of Missouri during the period in question - those which either never paid them or will get refunds under state refund procedures, and those which will not get refunds; and that classification violates the equal protection provisions of the Fourteenth Amendment 10

II. Procedural due process under the Fifth and Fourteenth Amendments requires that an agency send notice not only to a corporate taxpayer but also to its counsel of record before the period for calculating a time limitation on the taxpayer's right to appeal should begin 14

CONCLUSION 18

APPENDIX—

A. Opinion of May 17, 1988, of the Supreme Court of Missouri A1

B. Order of June 14, 1988, of the Supreme Court of Missouri Denying Petitioner's Motion for Rehearing A18

C. Statement of the Case, Findings of Fact and Conclusions of Law and Decision of July 20, 1987, of the Administrative Hearing Commission of the State of Missouri A19

D. Statutory Provisions A35

TABLE OF AUTHORITIES

Cases:

Armstrong v. U. S., 364 U.S. 40 (1960) 9
Brinkerhoff-Faris Trust Co. v. Hill, 281 U.S. 673 (1930) 15
Community Federal Savings and Loan Association v. Director of Revenue, 752 S.W.2d 794 (Mo. banc 1988) 11
Dane v. Jackson, 256 U.S. 589 (1921) 8
Estate of Busch v. Ferrell-Duncan Clinic, Inc., 700 S.W.2d 86 (Mo. banc 1985) 15
Frick v. Pennsylvania, 268 U.S. 473 (1925) 8
Gott v. Norberg, 417 A.2d 1352 (R.I. 1980) 8, 9
Jefferson Savings and Loan Association v. Goldberg, 626 S.W.2d 640 (Mo. banc 1982) 3, 4, 11
McGowan v. Maryland, 366 U.S. 420 (1961) 11
Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983) 17
Mesker Brothers Industries, Inc. v. Leachman, 529 S.W.2d 153 (Mo. 1975) 13
Mount St. Mary's Cemetery Association v. Mullins, 248 U.S. 501 (1919) 9, 10
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 15, 16
Star Service & Petroleum v. Administrative Hearing Commission, 623 S.W.2d 237 (Mo. banc 1981) 12
State ex rel. Scott v. Roper, 688 S.W.2d 757 (Mo. banc 1985) 9
Trimble v. Gordon, 430 U.S. 762 (1977) 11
Tulsa Professional Collection Services, Inc. v. Pope, 108 S.Ct. 1340 (1988) 14-15, 17

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) 9

Winston v. Reorganized School District R-2, Lawrence County, Miller, Mo., 636 S.W.2d 324 (Mo. banc 1982) 11

Constitution:

United States Constitution

Amendment V ..... *passim*

Amendment XIV ..... *passim*

Statutes:

Section 136.035, Rev. Stat. Mo. (1978) 6

Section 137.505, Rev. Stat. Mo. (1978) 13

Section 139.100, Rev. Stat. Mo. (1978) 13

Section 139.130, Rev. Stat. Mo. (1978) 13

Section 140.100, Rev. Stat. Mo. (1978) 13

Section 140.120, Rev. Stat. Mo. (1978) 13

Section 140.740, Rev. Stat. Mo. (1978) 13

Section 148.500.1, Rev. Stat. Mo. (1978) 13

Section 148.530, Rev. Stat. Mo. (1978) 13

Section 161.273, Rev. Stat. Mo. (1978) 3, 6, 12, 15

Section 536.090, Rev. Stat. Mo. (1986) 3, 17

Section 621.050.1, Rev. Stat. Mo. (1986) 3, 12, 15

Rules:

Supreme Court Rule 34.1(a) 15

DR7-104 of Missouri Supreme Court Rule 4 14

Other Authorities:

Nichols' The Law of Eminent Domain (1980) 8

L. Tribe, *American Constitutional Law* (2nd ed. 1988) 12

No.

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COMMUNITY FEDERAL SAVINGS AND LOAN ASSOCIATION,
Petitioner,

vs.

DIRECTOR OF REVENUE, STATE OF MISSOURI, et al.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

The petitioner Community Federal Savings and Loan Association respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Missouri, entered in the above-entitled proceeding on May 17, 1988. The petitioner's motion for rehearing was denied on June 14, 1988.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Missouri is reported at 752 S.W.2d 794, and is reprinted in the appendix hereto, p. A1, *infra*.

The decision of the Administrative Hearing Commission of the State of Missouri has not been reported. It is reprinted in the appendix hereto, p. A19, *infra*.

JURISDICTION

The petitioner brought this action seeking refunds of intangible taxes paid to respondent Director of Revenue under a Missouri statute that was declared unconstitutional by the Missouri Supreme Court in 1982. In addition to seeking the refunds on statutory and common law grounds, the petitioner raised claims based upon the due process and equal protection provisions of the United States Constitution. The Administrative Hearing Commission of the State of Missouri ruled that petitioner was not entitled to any refunds and sustained a motion to dismiss a large portion of petitioner's claim on the grounds that its appeal had been untimely filed. See pp. A27-A31, *infra*. Upon petitioner's appeal, the Missouri Supreme Court, on May 17, 1988, reversed the Administrative Hearing Commission as to the basic entitlement of savings and loan associations to the refunds on statutory grounds, but affirmed the dismissal of the bulk of petitioner's claim on the grounds of untimely filing. See pp. A11-A13, *infra*. Petitioner's motion for rehearing was denied on June 14, 1988. See p. A18, *infra*. The jurisdiction of this Court to review the judgment of the Missouri Supreme Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, United States Constitution:

> No person shall be * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, Section 1, United States Constitution:

> * * * No State shall * * * deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jursdiction the equal protection of the laws.

Section 161.273, Revised Statutes of Missouri (1978), Section 621.050, Revised Statutes of Missouri (1986), and Section 536.090, Revised Statutes of Missouri (1986) are set forth in their entirety in the Appendix, pp. A35-A39.

STATEMENT OF THE CASE

In 1977, petitioner Community Federal Savings and Loan Association joined with a number of other savings and loan associations in filing suit to challenge the constitutionality of the Missouri savings and loan intangible tax law. After deciding to undertake the legal challenge, forty-three of the associations discontinued paying the taxes; and they were eventually exonerated by the 1982 decision of the Supreme Court of the State of Missouri in the case of *Jefferson Savings and Loan Association v. Goldberg*, 626 S.W.2d 640 (Mo. banc 1982),

which declared the tax to have been unconstitutional. During that period those associations simply refused to pay millions of dollars in intangible taxes; and, because of the *Jefferson Savings* decision, they will never have to pay them, for the Director of Revenue abandoned his collection actions against them on the grounds that the assessments "had been cancelled and abated."

Most of the other savings and loan associations in Missouri, rather than refuse to pay the taxes during the litigation period, made millions of dollars in payments to the State and filed claims for refunds on the grounds of the unconstitutionality of that tax law, anticipating a return of those funds if the *Jefferson Savings* case were successful. After the 1982 decision was handed down, however, the Director of Revenue not only refused to refund the taxes, but also disbursed over $12.8 million he still held in receipts from those "taxes" to local political subdivisions around the state, in accordance with their normal distribution procedures.

Community Federal Savings and Loan Association was one of the associations seeking refunds, not only for itself for direct payments it had made to the State in the years in question, but also on behalf of five other savings and loan associations that were merged into Community Federal during or after the *Jefferson Savings* litigation. Of the $10,040,554.49 in refunds sought by Community Federal, $7,256,373.00 were for payments made directly by Community Federal, and $2,784,181.49 were for payments made by the merged associations before their mergers into Community Federal.

The General Counsel of the Department of Revenue, on behalf of the Director of Revenue, issued his "final

decisions" denying refunds of intangible tax payments over the course of several weeks during the last two months of 1982. Though counsel for Community Federal had corresponded with the Director of Revenue and the General Counsel before then, the General Counsel did not send copies of the decisions to the attorney for Community Federal with whom he had been communicating, nor did he send him notice of the decisions. Instead, the decisions were only sent to Community Federal offices in different locations. The notices regarding the amounts paid by the savings and loan associations that had already merged into Community Federal were mailed on December 20 and December 22, 1982. However, the notice regarding the amount paid by Community Federal directly was mailed to a Community Federal location in St. Louis County on November 22, 1982. The appeal to the Administrative Hearing Commission on behalf of Community Federal and its merged associations was filed on January 19, 1983.

Because, pursuant to the provisions of the intangible tax law, the payments from the savings and loan associations were to be disbursed to local political subdivisions each year, several of the recipient school districts were allowed to intervene in this action before the Administrative Hearing Commission.

In its Complaint and Briefs before the Administrative Hearing Commission, petitioner raised, as alternative bases for relief, in addition to statutory and common law remedies, the protections provided by the due process and equal protection provisions of the Fifth and Fourteenth Amendments to the United States Constitution. The Director of Revenue filed a motion to dismiss the petitioner's claim for refund of the sums paid by it directly (the $7,256,373.00)

on the grounds that, under Section 161.273, RSMo (1978), which required appeals from decisions of the Director to be filed with the Administrative Hearing Commission within thirty days after the decision was mailed, the appeal was untimely filed. The Administrative Hearing Commission issued its decision denying the refunds and granting the respondent's motion to dismiss on August 6, 1987. (Appendix, pp. A19-A34)

The petitioner appealed to the Missouri Supreme Court from the decision of the Administrative Hearing Commission and again raised its claims under the Fifth and Fourteenth Amendments as alternative bases for relief. The Missouri Supreme Court, on May 17, 1988, reversed the Administrative Hearing Commission as to refund claims that were considered timely filed with the Administrative Hearing Commission, on the basis that the refunds were authorized under Missouri's general tax refund statute (Section 136.035, RSMo). The Court, however, also affirmed the Commission's dismissal of the portion of petitioner's refund claim that was considered to have been untimely appealed. (Appendix, pp. A1-A17) Petitioner's motion for rehearing was denied on June 14, 1988. (Appendix, p. A18) On June 16, 1988, the Court issued its mandate to the Commission in conformity with its decision.

Petitioner files this petition to seek review on constitutional grounds of the denial by respondent of the refunds of the amounts considered, for statutory purposes, to have been untimely appealed.

REASONS FOR GRANTING THE WRIT

I.

Taxpayers are entitled to the return of moneys required to be paid by an unconstitutional state statute under the protections provided under the Fifth and Fourteenth Amendments to the United States Constitution even when they do not qualify for a statutory refund for failure to meet state procedural requirements.

While the Missouri Supreme Court allowed savings and loan associations which had timely filed refund claims and appeals under state statutes to recover their refunds under those statutory provisions, it should also have allowed petitioner the refund of the portion of its claims that was deemed to have been untimely appealed on one of several constitutional grounds which were raised and argued before as alternative bases for relief.

A

The failure to return the moneys is so unfair and confiscatory that it violates the due process and taking provisions of the Fifth and Fourteenth Amendments.

The Fifth and Fourteenth Amendments to the United States Constitution guarantee due process of law to the petitioner. The State of Missouri has retained over seven million dollars paid by petitioner, which - like other institutions in the depressed savings and loan industry - cannot now afford to do without it, when the State had no lawful authority to collect the "tax" in the first place, because the intangible property tax law was unconstitutional.

The Missouri Director of Revenue, when he refused to refund the intangible taxes in 1982, took petitioner's private property in violation of the Fifth Amendment to

the U. S. Constitution. The remedy is an award by the Court of damages equivalent to the value of the property when it was taken.

While the law of eminent domain is often distinguished from the law of taxation, in one major area of tax law, the law regarding takings has played a significant role: excessive property tax assessments are deemed not to be the exercise of the taxing power but an act of confiscation - "spoliation under the guise of exerting the power of taxing." *Dane v. Jackson,* 256 U.S. 589, 599 (1921). Many challenged tax assessments have been set aside over the years on the grounds that the assessments violate the takings provisions of the Fifth and Fourteenth Amendments. *Nichols' The Law of Eminent Domain* §1.41[4] nn. 95-96 (1980).

But the application of constitutional protections against takings to tax cases is not limited to property tax cases. In a case dealing with estate taxes, the United States Supreme Court, in *Frick v. Pennsylvania,* 268 U.S. 473, 488-89 (1925), held:

> [T]he exaction by a State of a tax which it is without power to impose is a taking of property without due process of law in violation of the Fourteenth Amendment. . . .

The State of Missouri was without power to impose this unconstitutional intangible tax. Therefore, the illegally collected taxes have been retained by the respondent in violation of the takings provisions of the Fifth and Fourteenth Amendments.

A 1980 Rhode Island case even recognized the applicability of the inverse condemnation remedy to estate tax cases. In *Gott v. Norberg,* 417 A.2d 1352 (R.I. 1980),

the state erroneously exacted an estate tax that it later refunded, but the executor sued in inverse condemnation for interest on the amount of the overpayment while it had been held by the state. The court held the "arbitrary levy" by the tax collector was an administrative malapportionment equivalent to a legislative imposition of an unconstitutional tax (*id.* at 1360), and it awarded the interest under the takings clause protections.

Several cases besides *Gott* also suggest a broad applicability of the prohibitions against uncompensated takings to governmental exactions of money and intangible property. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) allowed private party claimants to collect interest on funds held in an interpleader suit from the county that had retained them, calling their retention an "exaction" and a "forced contribution" that would unfairly force some to bear public burdens which in fairness should be borne by the public as a whole. In *Armstrong v. U. S.*, 364 U.S. 40 (1960), the destruction of materialmen's liens by actions otherwise authorized by federal law was also deemed to be a compensable taking. And in *State ex rel. Scott v. Roper*, 688 S.W.2d 757 (Mo. banc 1985), the Missouri Supreme Court held that requiring court-appointed attorneys to bear litigation expenses in civil cases was not authorized, for it would constitute the taking of a lawyer's private property without compensation.

In *Mount St. Mary's Cemetery Association v. Mullins*, 248 U.S. 501 (1919), the United States Supreme Court considered tax assessments of a sewer district in Kansas City which were being challenged on the grounds that the large tax was a deprivation of property in violation of due process of law. While the Court said that it did not

find the particular action of the taxing authorities being questioned to be so "arbitrary and unreasonable" as to constitute a violation of due process, the Court wrote:

> [This court] does not interfere with the taxation and assessment laws of the States as violative of the Fourteenth Amendment unless the State's action has been palpably arbitrary or grossly unequal in its application to the persons concerned. (*Id.* at 506)

In the instant case, if the combination of State laws and actions would otherwise result in the respondent's retaining the seven million dollars at issue, the relevant tax laws and State actions should be characterized as a violation of petitioner's right to due process and contrary to the takings provision, because their application to petitioner is "palpably arbitrary and grossly unequal." The result is violative of the fundamental fairness that is due to a taxpayer who continued to pay disputed taxes, rather than withholding them. Therefore, the respondent should be required to return the disputed amounts to the petitioner.

B

The failure to return the moneys creates two classes of taxpayers for purposes of the "taxes" illegally collected by the State of Missouri during the period in question - those who either never paid them or will get refunds under state refund procedures, and those who will not get refunds; and that classification violates the equal protection provisions of the Fourteenth Amendment.

The Fourteenth Amendment to the United States Constitution guarantees all citizens the equal protection of the laws. Because more than forty savings and loan

associations will never have to pay at least several million dollars in unconstitutional intangible taxes because they withheld those payments during various stages of the *Jefferson Savings* litigation, and because most of the other associations will receive refunds under the decision of the Missouri Supreme Court in the case of *Community Federal Savings and Loan Association v. Director of Revenue*, 752 S.W.2d 794 (Mo. banc 1988) (Appendix, pp. A1-A17), the State has created two classes of savings and loan associations: those that will never have to pay the taxes or that will receive the funds, and those that will never get their wrongfully collected taxes back.

Statutes and state actions contravene the equal protection provisions of the Fourteenth Amendment to the United States Constitution when there is no possible rational basis for the classification in the context of a conceivable legitimate state interest or purpose. *See, e.g., Trimble v. Gordon*, 430 U.S. 762 (1977). As stated in *Winston v. Reorganized School District R-2, Lawrence County, Miller, Mo.*, 636 S.W.2d 324, 327-28 (Mo. banc 1982):

> As the general purpose of the equal protection guarantees is to safeguard against invidious discrimination, differentiations between classes, not suspect or specially protected, are permissible, unless the classification rests on grounds irrelevant to achievement of the State's objectives.

See also McGowan v. Maryland, 366 U.S. 420 (1961).

The application of the "minimum rational basis test" in this case requires answering the following questions:

1. Is there governmental action by the state classifying a group of persons in the same or similar situation?

2. If so, is the purpose or end of the classification legitimate?

3. If so, is the means employed to achieve the end reasonably related to that purpose? *Star Service & Petroleum v. Administrative Hearing Commission*, 623 S.W.2d 237, 240 (Mo. banc 1981); L. Tribe, *American Constitutional Law* 1436-1672 (2nd ed. 1988).

In this case the first question must be answered affirmatively. The State, through the statutory time limit of Section 161.273, RSMo (Appendix, pp. A35-A36) (now Section 621.050.1, RSMo (Appendix, pp. A37-A38)) on appeals from decisions by the director of revenue, has created a classification of savings and loan associations differentiated by whether they have to pay an unconstitutional intangible property tax.

The purpose or end of the classification is not legitimate, however, and thus the State's action runs afoul of the equal protection clause. The State merely wants to be able to retain funds paid in by taxpayers. This does not, however, constitute a rational basis for the invidious discrimination against petitioner savings and loan association, which cooperated with the government throughout the litigation process by paying the "taxes" allegedly due, when the discrimination favors savings and loan associations that totally refused to pay the "taxes" in question.

In order to discuss the third question in the minimum rational basis test, it is necessary to assume a legitimate purpose behind the classification. Nevertheless, even if there were a legitimate purpose for the State to retain these intangible taxes paid under an unconstitutional tax, it should not be able to achieve that objective by such

coercions as the confiscation of property and other penalties that are prescribed in Missouri statutes against a taxpayer litigating the constitutionality of a tax law, which are tantamount to statutory coercion and duress. Under Section 148.500.1, RSMo (1978), the associations had to pay the taxes; and Section 148.530, RSMo (1978), authorized the same penalties to be assessed against delinquent taxpayers as were provided by law in the case of tangible personal property taxes. Those penalties could have included the following, depending in part upon the location of the savings and loan association:

a. Assessing the property at 125% of its value (for failure to file a return, Section 137.505, RSMo 1978);

b. Seizure and sale of property (Section 140.120, RSMo 1978);

c. A penalty of 10% of each year's delinquency (Sections 139.100 and 140.100, RSMo 1978);

d. Payment of the costs of a seizure or sale (Section 139.130, RSMo 1978); and

e. Payment of attorneys fees of ten percent of the amount due (Section 140.740, RSMo 1978).

With duress eliminated as a means of collecting taxes while the validity of a tax is being litigated (*e.g., Mesker Brothers Industries, Inc. v. Leachman*, 529 S.W.2d 153 (Mo. 1975)), the means of obtaining and retaining taxes would be reasonably related to the purpose. In this case, however, that was not so.

Because this state action fails the minimum equal protection test in at least two manners - by not having

a legitimate objective and by not having a reasonable means - its discrimination is unconstitutional. The remedy is an order requiring the respondent to stop violating petitioner's constitutional rights by paying to it its full refunds.

II.

Procedural due process under the Fifth and Fourteenth Amendments requires that an agency send notice not only to a corporate taxpayer but also to its counsel of record before the period for calculating a time limitation on the taxpayer's right to appeal should begin.

The fact that petitioner was being represented by counsel on its refund claims was made known to both the respondent and his counsel and recognized by them, as shown by their correspondence with him, prior to the issuance of the decisions in this case. Nevertheless, when respondent's counsel issued the decision denying the claims, he mailed them not to the petitioner's counsel, but rather to the general headquarters of the company (addressed only to the corporation and not to the officer who signed the refund claims).

Petitioner argued below (unsuccessfully) that this notice was insufficient to trigger the start of the limitations period on appeals from decisions by the director of revenue on the grounds of the violation of the code of professional responsibility (DR7-104) and under the doctrine of merger (for several decisions were mailed later that dealt with claims of entities that previously had merged into Community Federal). With the recent decision, however, in *Tulsa Professional Collection Services, Inc. v. Pope*, 108

S.Ct. 1340 (1988), which was announced after this case was argued before the Missouri Supreme Court, petitioner believes that new grounds for relief have been presented, and that the *Tulsa* decision establishes a new standard for notices that should be applicable in this case. Petitioner therefore raises this issue under the doctrine of *Brinkerhoff-Faris Trust Co. v. Hill*, 281 U.S. 673, 677-78 (1930) and Rule 34.1(a).

In the *Tulsa* case, the Court held that due process requires that notice be given to creditors of probate estates "by mail or other means as certain to insure actual notice." *Id.* at 1348. The case in effect overrules *Estate of Busch v. Ferrell-Duncan Clinic, Inc.*, 700 S.W.2d 86 (Mo. banc 1985), which had held that due process notice requirements were not called for because the time periods were self-executing statutes of limitations. The *Tulsa* case holds these probate laws are not self-executing statutes of limitations, in large part because they were not self-executing in that they are triggered by state action (in receiving the probate filings, appointing executors, and so on). Similarly, the provisions of Missouri law limiting the time for filing appeals from administrative decisions (originally Section 161.273, RSMo (1978) and now Section 621.050.1, RSMo (1986)) are not self-executing, for they are triggered by the decisions and mailings by the state agencies.

The United States Supreme Court, in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), held that before a state may take a step that would affect an interest in life, liberty or property that is protected under the due process clause, it must provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford

them an opportunity to present their objections." The Court went on:

> [P]rocess which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. (*Id.* at 315)

Notice to large corporations which is not sent to the individual acting on the record on behalf of the corporation, and which is not sent to the attorney for that party, is simply not reasonably calculated to apprise that corporation of the action. Rather, it is calculated to avoid effective response through the kind of delays that occurred here due to the failure of the notice to arrive to the attention of an individual who could take effective responsive measures. That is why civil rules of procedure require service of summonses not merely on anyone in a defendant corporation (like a mail clerk), but on someone in a position of authority in that corporation (an officer or manager). That is also why it would be insufficient to *effectively inform* any large organization - be it General Motors Corporation or the United States government - of an action merely by mailing a notice to "General Motors Corporation, Detroit, Michigan" or "The United States Government, Washington, D.C." If the underlying premise in procedural due process notice cases is, as it appears to be, that the government must give *effective* notice of actions before it can deprive parties of property, then the notice required to be given here, as applied to petitioner, was simply inadequate. In dealing with large organizations, notice sent merely to a party - and not to its attorney of record and not to the attention of an officer or manager in the corporation - is not reasonably calculated to provide actual notice of the action.

Under Section 536.090, RSMo, notices of decisions by administrative agencies in Missouri are required to be sent to a party *or* its attorney. Allowing delivery of the notice in the alternative in circumstances where it is addressed merely to a corporate party and not to its counsel violates the spirit of the notice requirements set out in *Tulsa*. As the Court required multiple notices in *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), so multiple notices - not only to a party but also to that party's attorney, if it has one - should be required, before the government can retain disputed taxes after an administrative proceeding.

As the Court stated in *Tulsa*, in applying these principles courts are to balance the interest of the State with "the individual interest sought to be protected by the Fourteenth Amendment." *Id.* at 1334. Lack of effective actual notice caused petitioner to miss the apparent appeal date for the refund under Missouri statutes of over seven million dollars paid in unconstitutional taxes - sums it would otherwise be receiving back, and which would be particularly useful in these times of general hardship for savings and loan associations. The State's interest in mailing only one notice - to either the party *or* its attorney - is infinitesimally small in comparison. In addition, as required by *Mennonite*, the State could easily try harder to send the notice to the right addressee; for here it did not even use "reasonably diligent efforts" to do so. More should be required to provide greater certainty that the notice will be effective.

Because the State of Missouri has failed to meet minimal due process standards in its notices of decisions from administrative hearings, the dismissal of the appeal of the claims for amounts paid directly by the petitioner should be reversed.

CONCLUSION

For the various reasons stated above, the petition for writ of certiorari should be granted. The petitioner should not be denied the recovery of these funds on technical bases when their retention is unfair and unjust, given the petitioner's compliance with the tax laws during the interim period of that constitutional challenge; and the due process and takings provisions of the Constitution should provide real protections to place petitioner in the same position vis-a-vis this "tax" as its competitors. Furthermore, relief should be granted because the State's law on notices of administrative decisions fails to meet procedural due process requirements. The petitioner therefore respectfully requests that a Writ of Certiorari be issued and that this cause be heard by the Supreme Court.

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APPENDIX

(Filed May 17, 1988)

SUPREME COURT OF MISSOURI
EN BANC

No. 69678

COMMUNITY FEDERAL SAVINGS & LOAN ASSOCIATION,
Appellant,

vs.

DIRECTOR OF REVENUE, STATE OF MISSOURI,
Respondent.

(consolidated with)
No. 69718

MUTUAL SAVINGS & LOAN ASSOCIATION,
Appellant,

vs.

DIRECTOR OF REVENUE, STATE OF MISSOURI,
Respondent.

SCHOOL DISTRICT OF KANSAS CITY, MISSOURI, REORGANIZED SCHOOL DISTRICT NO. 7 OF JACKSON COUNTY, MISSOURI (LEE'S SUMMIT), and NORTH KANSAS CITY SCHOOL DISTRICT OF CLAY COUNTY, MISSOURI,
Intervenors-Respondents.

A2

On Petitions for Review of Decisions of the Administrative Hearing Commission
Honorable Paul M. Spinden, Commissioner

The Administrative Hearing Commission affirmed decisions of the Director of Revenue that appellants are not entitled to refunds of intangible property taxes paid under section 148.480, RSMo 1978, subsequently held unconstitutional in Jefferson Savings and Loan Association v. Goldberg, 626 S.W.2d 640 (Mo. banc 1982). The principal question is whether appellants are precluded by sovereign immunity from recovery under the general refund statute, section 136.035, RSMo 1986.[1] A question peculiar to appellant Community Federal is whether its claim was properly dismissed for failure to file timely appeal from the Director's final decision as provided by section 161.273, RSMo 1978 (transferred now section 621.050, RSMo 1986). A final question, raised by inter-

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1. Section 136.035, RSMo 1986, provides:

Director to refund taxes, when—claim to be filed within two years of date of payment.—1. The director of revenue from funds appropriated shall refund any overpayment or erroneous payment of any tax which the state is authorized to collect. The general assembly shall appropriate and set aside funds sufficient for the use of the director of revenue to make refunds authorized by this section or by final judgment of court.

2. The director of revenue shall refund any overpayment or erroneous payment of any tax on intangible personal property and the amount refunded shall be charged against the next apportionment to the political subdivision which was the residence or situs of the taxpayer at the time the tax was paid.

3. No refund shall be made by the director of revenue unless a claim for refund has been filed with him within two years from the date of payment. Every claim must be in writing under oath and must state the specific grounds upon which the claim is founded.

venors, is whether such refunds would violate article X, section 21, Constitution of Missouri, which prohibits the state from reducing its proportion of the costs of free public schools. Intervenors also question the subject of the holding in *Jefferson Savings and Loan*. The dismissal against Community Federal is affirmed; the decision against all other appellants is reversed.

Appellant Community Federal acquired three savings institutions, appellants Citizens Savings Association, Plaza Savings Association, and Crystal City Savings & Loan Association, by merger before the final decisions of the Director of Revenue, and two institutions, appellants Carondelet Savings & Loan Association and First Federal Savings & Loan Association of Moberly, after their appeals to the Administrative Hearing Commission. All these claims were consolidated in one appeal from the adverse decisions of the AHC and consolidated with the simliar appeal of Mutual Savings & Loan Association.

Appellants are savings and loan associations of individual members engaged in the business of receiving, holding and investing members' money and making loans. Mutual Savings & Loan Association paid intangible taxes for 1975 through 1980 in total sum of $249,407.76. Community Federal Savings & Loan Association paid intangible taxes for 1975 through 1981 in a total sum of $7,256,373.00. Community Federal's five acquired institutions, Citizens, Plaza, Crystal City, Carondelet, and First Federal, paid intangible taxes in their own right during the period 1975 to 1981 in a total sum of $2,787,180.89. Appellants paid the taxes from their funds; none of their account holders paid any portion of the taxes, and appellants did not charge members' accounts for any of the taxes paid.

Respondent Director held appellants' intangible tax payments in an account until all but his two percent commission had been distributed to local governments pursuant to chapter 148, RSMo. Included in the distribution to each county was a schedule describing the amount each political subdivision in the county was to receive pursuant to section 148.500, RSMo 1978.

The amount of appellants' intangible tax payments was correctly computed. Appellants paid their taxes as required by the statutory scheme, without protest. During the periods at issue, some 53 other savings and loan associations did not pay their intangible taxes for one or more years. Respondent Director sent an assessment to the nonpaying savings and loan associations to pay the delinquent taxes. Some, if not all, of those associations filed appeals with the AHC. Subsequent to this Court's decision in *Jefferson Savings and Loan,* and on motion of the Director, the AHC dismissed those cases on the ground that the Director had cancelled and abated the assessments.

I.

Appellants contend the AHC erred in failing to reverse the denial of refunds by respondent Director because their claims are authorized by the general tax refund statute, section 136.035, RSMo 1986, and are not precluded by sovereign immunity.

The AHC found, and respondent Director and intervenors argue, that section 136.035, RSMo 1986, does not expressly provide that the sovereign can be sued. Specifically, the AHC found that the term "overpayment" in section 136.035.2 should not be construed to include

payment of a tax declared unconstitutional. The AHC concluded the language in section 136.035.2, "the amount refunded shall be charged against the next apportionment . . . ," precluded appellants from receiving a refund because when a tax is declared unconstitutional, payment stops and there will not be a "next apportionment." The AHC also found that the general assembly did not contemplate a refund in the case where an intangible property tax is declared unconstitutional and construed the statute strictly against appellants' claims under Gas Service Co. v. Morris, 353 S.W.2d 645, 648 (Mo. 1962).

The courts of this state have consistently held that the state may not be sued without its consent. Kleban v. Morris, 247 S.W.2d 832, 836 (Mo. 1952). "The right of sovereign immunity from suit exists independent of express sanction, and it is the consent to be sued that is to be expressed in constitutional or statutory enactment or waived by voluntary appearance and submission to jurisdiction." *Id.* at 837, 838. Here the action is for the recovery of money, held by the state treasury, and the state is entitled to invoke its sovereign immunity unless it expressly consents not to do so. *See also* Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 691, 69 S.Ct. 1457, 1462 n.11 (1949); American Trucking Association, Inc. v. Conway, 146 Vt. 579, 585, 508 A.2d 408, 414 (1986).

The majority rule is that statutes waiving the immunity of the sovereign from suit are strictly construed, *Kleban,* 247 S.W.2d at 837; *Gas Service Co.,* 353 S.W.2d at 649. Section 165.035.2 states the "director of revenue shall refund any overpayment or erroneous payment of any tax on intangible personal property . . . ," but does not pronounce specifically on the refund of taxes paid under a statute later held unconstitutional.

Public policy discourages suit for the refund of taxes erroneously paid or illegally collected. Governments are entitled to presume that statutes are constitutional. Government budgets are prepared on an annual cash basis. Lavin v. Hackensack Board of Education, 90 N.J. 145, 154, 447 A.2d 516 (N.J. 1982), *cited in* Continental Trailways, Inc. v. Director, 102 N.J. 526, 509 A.2d 769, 781 (N.J. 1986). Therefore in the absence of a statutory limitation on the time in which a taxpayer may file suit to declare a tax unconstitutional, governments would be subject to substantial liabilities from refunds of those unconstitutional taxes. Accordingly, in the absence of statutory authority, taxes voluntarily, although erroneously paid, albeit under an unconstitutional statute, cannot be refunded. Berry v. Daigle, 322 A.2d 320, 326-27 (Me. 1974); 72 Am. Jur. 2d, State & Local Taxation, p. 1074, 1087 (1974), *cited in* 509 A.2d at 781.

Appellants paid the intangible property tax believing the law constitutional. Appellants did not file a protest with the Director but did join in the declaratory judgment action against the Director filed by more than 90 savings and loan associations which resulted in the tax being declared unconstitutional in *Jefferson Savings and Loan.*

The refund of taxes illegally enacted is ordinarily a matter of governmental grace. On grounds of public policy the law discourages suit for the refund of taxes illegally collected, and many restrictions are imposed on their recovery. It is generally held that taxes voluntarily paid without compulsion, although levied under an unconstitutional statute, cannot be refunded without the aid of statutory remedy. 51 Am. Jur. Taxation, § 1167, *cited in* State ex rel. S. S. Kresge Co. v. Howard, 208 S.W.2d

247 (Mo. banc 1947). Had these appellants failed to pay the intangible property tax, they would have been subjected by the Director to assessment of a penalty for delinquent payment of taxes. § 148.530, RSMo 1978. Payment to avoid harsh penalties is not voluntary payment of taxes. Manufacturer's Casualty Ins. Co. v. Kansas City, Mo., 330 S.W.2d 263, 267 (Mo. App. 1959). Appellants thus did not pay the taxes voluntarily, and they subsequently questioned the legality of the tax.

Respondent Director and intervenors classify the taxes as illegally collected taxes and because the legislature included only the terms "overpayment" and "erroneous payment of taxes," argue there can be no refund because there is no express intent by the legislature to recognize refund of taxes declared unconstitutional. Appellants argue that respondent Director focuses only on the cause and not the effect of the payment. They claim they paid more to the state than was necessary because the tax was unconstitutional, their liability was zero, and therefore they made an overpayment to respondent Director.

Section 136.035 is subject to the ordinary rules of statutory construction and interpretation. The word "overpayment" in section 144.190[2] has been interpreted

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2. Section 144.190, RSMo 1986, provides:

Refund of overpayments—claim for refund—time for making claims.—1. If a tax has been incorrectly computed by reason of a clerical error or mistake on the part of the director of revenue, such fact shall be set forth in the records of the director of revenue, and the amount of the overpayment shall be credited on any taxes then due from the person under sections 144.010 to 144.510, and the balance shall be refunded to the person his administrators or executors, as provided for in section 144.200.

(Continued on following page)

by this Court in *Kleban*, 247 S.W.2d at 839, to include taxes illegally collected. Although the refund for overpayments in section 144.190 refers to sales and use tax, the statute is an aid in interpreting what meaning the legislature intended for the terms "overpayment" and "erroneous." An erroneous or illegal tax is one levied without statutory authority. Black's Law Dictionary, 486, (5th ed.1979). Overpayment is a discharge of an obligation or debt in excess of payment. *Id.* at 994, 1016. The provisions of section 144.190 are for the recovery of sales taxes which have been incorrectly computed, or of sales taxes paid twice, or of sales taxes erroneously or illegally collected, or of sales taxes illegally imposed. Hern v. Carpenter, 312 S.W.2d 823, 828 (Mo. 1958).

In construing statutes, the court's primary responsibility is to ascertain the intent of the General Assembly from the language used and to give effect to that intent. Brown Group, Inc. v. Administrative Hearing Commis-

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Footnote continued—

2. If any tax, penalty or interest has been paid more than once, or has been erroneously or illegally collected, or has been erroneously or illegally computed, such sum shall be credited on any taxes then due from the person under sections 144.010 to 144.510, and the balance, with interest as determined by section 32.065, RSMo, shall be refunded to the person, but no such credit or refund shall be allowed unless duplicate copies of a claim for refund are filed within three years from date of overpayment.

3. Every claim for refund must be in writing under oath, and must state the specific grounds upon which the claim is founded. Any refund or any portion thereof which is erroneously made, and any credit or any portion thereof which is erroneously allowed, may be recovered in any action brought by the director of revenue against the person. In the event that a tax has been illegally imposed against a person, the director of revenue shall authorize the cancellation of the tax upon his record.

sion, 649 S.W.2d 874 (Mo. banc 1983). In determining legislative intent, the court must first consider the language of the statute and words employed in their plain and ordinary meaning, State ex rel. D.M. v. Hoester, 681 S.W.2d 449 (Mo. banc 1984). Provisions of the entire legislative act must be construed together and if reasonably possible all provisions must be harmonized, Collins v. Director of Revenue, 691 S.W.2d 246 (Mo. banc 1985).

Title X, Taxation and Revenue, Missouri Statutes, contains both sections 144.190 and 136.035. Although this Court has interpreted the words "overpayment" and "erroneous" to include the meaning "illegal" in section 144.190, *Kleban; Hern,* the terms "overpayment" and "erroneous" in section 136.035 have not been defined by the legislature or interpreted by this Court. Where language of a statute is clear and unambiguous there is no room for construction. Metro Auto Auction v. Director of Revenue, 707 S.W.2d 397 (Mo. banc 1986). A statute should not be construed to lead to an absurd result. State ex rel. Zoological Park Subdistrict of City and County of St. Louis v. Jordan, 521 S.W.2d 369 (Mo. 1975). A reasonable construction of the terms "overpayment" and "erroneous" as used in section 136.035 includes the term "illegal" as seen from other interpretations by this Court, the plain meaning of the language and the definition in Black's Law Dictionary.

The State of Missouri has thus consented to a refund of any overpayment, erroneous or illegal payment, which would include a tax declared unconstitutional, of any tax on intangible personal property by the terms of section 136.035; and all appellants that have followed the proper procedures for applying for a refund, are entitled

to a refund of that overpayment, erroneous or illegal payment.

Respondent Director claims when the tax was declared unconstitutional there was no next apportionment to a political subdivision from which to make a refund; therefore, the legislature did not authorize the refund of taxes collected prior to the declaration of unconstitutionality.

Ten months after the decision in *Jefferson Savings and Loan*, respondent Director distributed $12,800,000 in intangible taxes collected before section 148.480 was held unconstitutional. Missouri has intangible taxes other than the taxes in section 148.040, RSMo 1986, including taxes on intangible personal property, banking institutions, credit institutions, credit unions, insurance companies and farmers cooperative credit associations. All intangible taxes were commingled in one fund by respondent Director. There was a next apportionment from this fund and the holding that intangible property tax on savings and loan associations was unconstitutional did not prevent respondent Director from disbursing intangible taxes to eligible recipients.

Intervenors claim this Court held that the tax paid by appellants did not meet the constitutional definition of an intangible personal property tax. *Jefferson Savings and Loan*, 626 S.W.2d at 644, *citing* art. X, § 4(b), Mo. Const. Intervenors' analysis of *Jefferson Savings and Loan* is flawed. Suffice to say appellants and respondent in this case agree that the holding in *Jefferson Savings and Loan* dealt with the constitutionality of the intangible property tax. The Court also specifically found that section 148.480 violated art. X, section 4(b), and

concluded the intangible property tax was unconstitutional. *Id.*

II.

All appellants except Community Federal Savings & Loan Association filed timely appeals from the Director's final decision in compliance with section 161.273, RSMo (transferred now section 621.050, RSMo 1986).[3] Appellant Community Federal failed to file its appeal within the 30-day time limit. It argues that its appeal should not be dismissed, however, because the decision of the Director against Community Federal was not final until the decisions against all its merged associations had been received, Community Federal having acquired those institutions by merger before the decisions were mailed.

Community Federal acquired Citizens on March 4, 1980; Plaza on March 2, 1981; Crystal City on August 3, 1981; Carondelet on February 28, 1983; and First Federal on February 28, 1983. Respondent Director issued final decisions denying the requests of Carondelet, First Federal and Community Federal on November 23, 1982; Cit-

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3. Section 621.050, RSMo 1986, provides:

Administrative hearing commission to hear appeals from director of revenue—procedures—interest—burden of proof.—1. Except as otherwise provided by law, any person or entity shall have the right to appeal to the administrative hearing commission from any finding, order, decision, assessment or additional assessment made by the director of revenue. Any person or entity who is a party to such a dispute shall be entitled to a hearing before the administrative hearing commission by the filing of a petition with the administrative hearing commission within thirty days after the decision of the director is placed in the United States mail or within thirty days after the decision is delivered, whichever is earlier. The decision of the director of revenue shall contain a notice of the right of appeal in substantially the following language: . . . .

izens and Plaza on December 20, 1982; and Crystal City on December 22, 1982. These final decisions were sent directly to those appellants. Carondelet and First Federal filed timely appeals with the AHC on December 17, 1982. Community Federal appealed in its own behalf and in behalf of Citizens, Plaza and Crystal City on January 19, 1983. Community Federal's own appeal was received by the AHC 57 days after respondent Director's mailing of the decision against Community Federal; the others were timely. Failure to comply with statutory time for appeal in an administrative proceeding results in a lapse of jurisdiction and loss of right of appeal. Springfield Park Central Hospital v. Director of Revenue, 643 S.W.2d 599 (Mo. 1983); Randles v. Schaffner, 485 S.W.2d 1 (Mo. 1972); Cardinal Glennon Memorial Hospital Coffee Shop v. Director of Revenue, 624 S.W.2d 115 (Mo. App. 1981).

Appellant Community Federal argues that it notified respondent Director by letter before the final decision was made that the merger of the three institutions had occurred and that Community Federal was succeeding in interest to all of the refund claims of Citizens, Crystal City and Plaza. Appellant contends it owned all of the claims and the merged entities no longer existed. Appellant claims the earliest it could appeal the decision of respondent Director was December 22, 1982, the date the last of the merged institutions received its final decision. Thus, appellant contends when it filed its appeal on the denial of its claim for refund on January 19, 1983, its appeal as to its own adverse decision was timely filed.

Appellant Community Federal cites no authority for this argument. Its vice president and controller admitted that there was an internal problem with routing of

mail by Community Federal personnel, and he received the final decision between December 23, 1982, and December 30, 1982. Nothing in section 161.273 (now section 621.050), 4 CSR 20-3.040, or the case law allows for an argument of delay by excusable neglect. The claims for refunds were made by separate entities and were separate causes of actions. Community Federal could have protected itself in the same manner, but failed to do so. The decision against Community Federal was final on November 22, 1982, and mailed on November 23, 1982. December 23, 1982, was the last day on which Community Federal could have obtained jurisdiction from the Commission for its appeal. Its request for refund was properly dismissed.

III.

Intervenors claim the AHC properly denied appellants' claims for refund because such refunds would violate the Missouri Constitution, art. X, section 21, which prohibits the state from reducing its proportion of the costs of free public schools.

This claim is not yet ripe. There has been no determination how refunds would be paid to appellants. Only those adversely affected would have standing to make a constitutional challenge. State ex rel. Reser v. Rush, 562 S.W.2d 365 (Mo. banc 1978). Intervenors must wait for the decision by this Court and subsequent determination how refunds will be paid. Only then can they know whether they are adversely affected and take whatever legal action may be appropriate.

The dismissal against Community Federal Savings & Loan Association of its claim for refund is affirmed; the

decisions against all other appellants on their claims for refund are reversed.

Andrew Jackson Higgins, Judge

BILLINGS, C.J., BLACKMAR, ROBERTSON, RENDLEN, JJ., and COVINGTON, Sp.J., concur;

WELLIVER, J., concurs in part and dissents in part in separate opinion filed.

DONNELLY, J., not sitting.

(Filed May 17, 1988)

SUPREME COURT OF MISSOURI
EN BANC

No. 69678

COMMUNITY FEDERAL SAVINGS & LOAN ASSOCIATION,
Appellant,

v.

DIRECTOR OF REVENUE, STATE OF MISSOURI,
Respondent,

(Consolidated with)
No. 69718

MUTUAL SAVINGS & LOAN ASSOCIATION,
Appellant,

v.

DIRECTOR OF REVENUE, STATE OF MISSOURI,
Respondent,

SCHOOL DISTRICT OF KANSAS CITY, MISSOURI, REORGANIZED SCHOOL DISTRICT NO. 7 OF JACKSON COUNTY, MISSOURI (LEE'S SUMMIT), and NORTH KANSAS CITY SCHOOL DISTRICT OF CLAY COUNTY, MISSOURI,
Intervenors-Respondents.

CONCUR IN PART AND DISSENT IN PART

I concur in part and dissent in part. I dissent from that part of the principal opinion which would deny

Community Federal's refund on the purported technicality of late filing.

Merger of savings and loan associations is controlled by § 369.084, RSMo 1986, which provides:

> 369.084. Merger, effect of.—When the merger or consolidation becomes effective:
>
> (1) *The several associations parties to the plan of merger or consolidation shall be a single association, which, in the case of a merger, shall be that association designated in the plan of merger as the surviving association,* and in the case of a consolidation, shall be the new association provided for in the plan of consolidation;
>
> (2) *The separate existence of all associations parties to the plan of merger or consolidation, except the surviving or new association, shall cease;*
>
> . . . .
>
> (5) All property, real, personal and mixed, and all debts due on whatever account, and all other choses in action, *and all and every other interest, of or belonging to or due to each of the associations so merged or consolidated shall be taken and deemed to be transferred to and vested in such single association without further act or deed;* and the title to any real estate, or any interest therein, under the laws of this state vested in any of such associations shall not revert or be in any way impaired by reason of such merger or consolidation;
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> (6) The surviving or new association shall thenceforth be responsible and liable for all the liabilities and obligations of each of the associations so

> merged or consolidated; *and any claim existing or action or proceeding pending by or against any of the associations may be prosecuted to judgment as if the merger or consolidation had not taken place, or the surviving, or new association may be substituted in its place, and neither the rights of creditors nor any liens upon the property of any of the associations shall be impaired by the merger or consolidation; . . .*

(Emphasis added.)

Clearly, the statute authorizes that "any claim existing or action or proceeding pending by or against any of the associations may be prosecuted to judgment separately and as if no merger had occurred, or, may be treated as a single claim with the surviving corporation "substituted in its place." Inherent in the latter is the right of the surviving corporation to make the appeal based upon the last judgment rendered against one of the component parts of the surviving corporation. There is no prejudice to the state whether the claim be treated in separate parts or as a single claim of the surviving corporation, or both.

Community Federal, like the others, is entitled to the refund and the cause should be reversed as to all parties.

Warren D. Welliver, Judge

CLERK OF THE SUPREME COURT
State of Missouri
Post Office Box 150
Jefferson City, Missouri
65102

Thomas F. Simon
Clerk

Telephone
(314) 751-4144

June 14, 1988

Mr. John S. Pletz
325 Jefferson Street
P.O. Box 1586
Jefferson City,
Missouri 65102

Mr. Duane Benton
P.O. Box 1251
Jefferson City,
Missouri 65102

Re: Community Federal Savings & Loan Association vs. Director of Revenue, State of Missouri, No. 69678

Gentlemen:

This is to advise that the Court this day entered the following order in the above-entitled cause:

"Appellant's motion for rehearing overruled."

Very truly yours,

/s/ Thomas F. Simon
Clerk

cc: Mr. Richard L. Wieler
(Asst. Attorney General)

Mr. Warren E. Slagle

BEFORE THE
ADMINISTRATIVE HEARING COMMISSION
STATE OF MISSOURI

Case No. RV-83-0061

COMMUNITY FEDERAL SAVINGS & LOAN ASSOCIATION,
Petitioner,

vs.

DIRECTOR OF REVENUE, STATE OF MISSOURI,
P.O. Box 475, Jefferson City, Missouri 65105,
Respondent,

STATEMENT OF THE CASE, FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

Statement of the Case

This matter comes before the Administrative Hearing Commission upon a Complaint filed on January 19, 1983, by Community Federal Savings and Loan Association, Petitioner, appealing the final decisions of the Director of Revenue, Respondent, issued on November 23, 1982. On September 26, 1983, Petitioner filed with this Commission a Motion for Consolidation of Complaints requesting consolidation of the instant case with two other cases pending before this Commission, *First Federal Savings & Loan of Moberly v. Director of Revenue,* No. RV-82-4744, and *Carondelet Savings & Loan Association v. Richard A. King,* No. RV-82-4742. This Commission granted the request on October 3, 1983, and consolidated the three cases.

Pending in this case, not ruled upon by this Commission, is Respondent's Motion to Dismiss for Untimely Filing of Appeal filed on March 1, 1983. The motion requests that Community Federal's complaint be dismissed for failure to file within the 30-day time period required by Section 161.273, RSMo 1978.

Upon their motions, this Commission permitted the School District of Kansas City, Missouri, and the Reorganized School District No. 7 of Jackson County to join the proceeding as parties-respondents. Upon their motions, this Commission permitted appearances as amicus curiae by the School District of Clayton, the Cooperative School Districts of the St. Louis Suburban Area, Inc., Cape Girardeau School District No. 63, Board of Education of the City of St. Louis, North Kansas City School District of Clay County, Warren E. Slagle, Missouri Municipal League, Howard C. Gosnell, Jr., and Thomas A. Vetter.

Following four continuances requested by the parties, this Commission convened an evidentiary hearing on August 22, 1984, in Jefferson City, Missouri. Appearing for the Petitioner was John S. Pletz of Bartlett, Venters and Pletz of Jefferson City, Missouri. Appearing for the Respondent was Jay C. Welch and David Rootes of the Department of Revenue. Appearing for the Intervenors-Respondents was Duane Benton, a Jefferson City attorney. The final brief was submitted on January 19, 1985. The case was reassigned to this commissioner on January 8, 1987.

Findings of Fact

1. The Petitioners are savings and loan associations of individual members engaged in the business of re-

ceiving, holding and investing members' money and making loans. The home office of Petitioner Community Federal Savings and Loan Association (Community Federal) is at 1 Community Federal Center in St. Louis, Missouri. The home office of Citizens Savings Association (Citizens) is at 222 South Jefferson in Mexico, Missouri. The home office of Plaza Savings Association (Plaza) is at 608 Ward Parkway in Kansas City, Missouri. The home office of Crystal City Savings and Loan Association (Crystal City) is at 106 Bailey Road in Crystal City, Missouri. The home office of First Federal Savings and Loan Association of Moberly (First Federal) is at 210 North Williams in Moberly, Missouri. The home office of Carondelet Savings and Loan Association (Carondelet) is at 7321 South Lindbergh Boulevard in St. Louis, Missouri.

2. Respondent is an officer of the State of Missouri responsible for enforcing and administering Missouri's intangible tax collection and refunds.

3. Community Federal acquired Citizens through merger on March 4, 1980; Plaza through merger on March 2, 1981; Crystal City through merger on August 3, 1981; and Carondelet and First Federal through merger on February 28, 1983.

4. On January 12, 1982, the Supreme Court of Missouri, in *Jefferson Savings and Loan Association v. Goldberg*, 626 S.W.2d 640 (Mo. banc 1982), declared unconstitutional the provisions of Section 148.480, RSMo 1978, for collection of an intangible property tax from holders of accounts in savings and loan associations. The ruling resulted from a declaratory judgment action filed by more than 90 savings and loan associations, including Petitioners, and four individual account or deposit holders.

5. Community Federal paid to Respondent intangible taxes for 1975 through 1981:

YEAR	DATE PAID	AMOUNT
1975	April 15, 1975	$ 683,023.00
1976	April 9, 1976	838,216.00
1977	March 30, 1977	987,297.00
1978	April 14, 1978	1,175,991.00
1979	April 13, 1979	1,185,270.00
1980	April 14, 1980	1,101,194.00
1981	April 15, 1981	1,285,382.00
	TOTAL	$7,256,373.00

6. Citizens paid intangible taxes to the Respondent:

YEAR	DATE PAID	AMOUNT
1975	April 8, 1975	$ 73,346.35
1976	April 12, 1976	103,195.63
1977	April 14, 1977	113,119.58
1978	April 5, 1978	75,482.52
1980	April 10, 1980	171,068.00
	TOTAL	$ 536,212.08

7. Plaza paid intangible taxes to the Respondent:

YEAR	DATE PAID	AMOUNT
1975	April 11, 1975	$ 50,054.00
1976	April 12, 1976	54,893.00
1977	April 14, 1977	54,089.00
1978	April 14, 1978	49,750.00
	TOTAL	$ 208,786.00

8. Crystal City paid intangible taxes to the Respondent:

YEAR	DATE PAID	AMOUNT
1977	January 14, 1977	$ 3,529.85
1978	January 20, 1978	3,935.61
1979	February 3, 1979	4,037.90
1980	January 31, 1980	4,013.50
1981	April 15, 1981	3,867.00
	TOTAL	$ 19,383.86

9. First Federal paid intangible taxes to the Respondent:

YEAR	DATE PAID	AMOUNT
1975	April 10, 1975	$ 16,824.65
1976	April 15, 1976	20,013.56
1977	April 12, 1977	25,244.76
1978	April 10, 1978	30,392.11
1979	April 11, 1979	32,462.32
1980	April 5, 1980	34,121.89
1981	April 14, 1981	39,976.66
	TOTAL	$ 199,035.95

10. Carondelet paid intangible taxes to the Respondent:

YEAR	DATE PAID	AMOUNT
1975	March, 1975	$ 177,833.88
1976	April, 1976	231,734.58
1977	April 15, 1977	239,557.89
1978	April 14, 1978	271,451.11
1979	April 15, 1979	269,910.48
1980	April 5, 1980	294,077.62
1981	April 5, 1981	339,198.04
	TOTAL	$1,823,763.60

11. Petitioners paid the entire amounts of the tax from their funds. None of their account holders paid any portion of the tax, and the Petitioners did not charge the accounts of any members for the tax. The Petitioners were not reimbursed for any of the tax. The Petitioners absorbed, at their option, the tax as an expense of doing business. Petitioners filed with the Respondent timely claims for refund of the intangible tax payments. No individual member or account holder of the Petitioners filed a timely claim for refund.

12. During the tax years at issue in this case, some individuals held accounts with the Petitioners when the Petitioners paid intangible taxes for a particular tax year but were not account holders when the Petitioners filed claims for refund of the intangible taxes for those tax years.

13. Some holders of accounts with the Petitioners when the Petitioners paid the intangible taxes are not account holders today, and some account holders today were not account holders when the Petitioners paid the intangible taxes.

14. Consistent with his general policy, Respondent mailed in each year at issue in this case a blank savings and loan intangible tax form to the Petitioners and to all savings and loan associations which had filed intangible tax returns for the previous year. Respondent did not mail the blank returns to account holders, and he did not make direct demand for payment of intangible taxes to account holders.

15. Respondent held the Petitioners' intangible tax payments in an account until he distributed all but two percent of the amounts to local governments pursuant to

Chapter 148. The two percent retained was a statutory collection fee. Included in the Respondent's distribution to each county was a schedule describing the amount each political subdivision in the county was to receive pursuant to Section 148.500, RSMo 1978.

16. Respondent has paid all of the intangible tax payments at issue in this case, except for the two percent collection fee to local political subdivisions, including Intervenors-Respondents, pursuant to the distribution scheme set forth in Section 148.500.2, RSMo 1978. Intervenors-Respondents included these payments in their regular income for the years in question and used the funds for calculating budgets and setting tax levies. Intervenors-Respondents have no surplus on hand from the tax years in question. The amount of state aid received by Intervenors-Respondents for the tax years in question was reduced by 57 percent of the amount of intangible taxes received the previous year pursuant to Section 163.031, RSMo 1978.

17. The amount of the Petitioners' intangible tax payments was the correct amount of tax owing.

18. During the periods at issue in this case, approximately 53 savings and loan associations did not pay savings and loan intangible tax for one or more years, including Plaza which did not pay for 1980 and 1981 and Citizens which did not pay for 1981.

19. In August 1983, Respondent sent notices of delinquent intangible tax and demands for payment to various savings and loan associations which had not paid intangible taxes for some of the years prior to 1982. Respondent, however, subsequently notified the associations that the notices and demands for payments had been

sent by mistake. No savings and loan association made an intangible tax payment as a result of the notices and demand for payment.

20. If a savings and loan association did not pay intangible tax for a year at issue in this case but filed an intangible tax return showing a balance due, Respondent sent an assessment to the association to pay the tax. Some, if not all, of those associations filed appeals with this Commission. Subsequent to the Supreme Court's decision in *Jefferson Savings and Loan Association*, supra, this Commission dismissed the cases on Respondent's motion on the ground that Respondent had cancelled and abated its assessments.

21. In response to Petitioners' request for refund of intangible taxes, Respondent, acting through its general counsel, issued final decisions denying the requests of Carondelet, First Federal and Community Federal on November 23, 1982; of Citizens and Plaza on December 20, 1982; and of Crystal City on December 22, 1982. The final decisions were sent directly to the Petitioners; copies were not submitted to their attorneys of record.

22. Carondelet and First Federal filed complaints with this Commission on December 17, 1982, challenging Respondent's final decisions. A single complaint was filed with this Commission on behalf of Community Federal, Citizens, Plaza and Crystal City on January 19, 1983.

23. Community Federal, Citizens, Plaza and Crystal City considered their claims for refund of intangible taxes to be a single claim and indicated this in a letter of August 11, 1982, to Respondent. Respondent answered through its general counsel on October 26, 1982, who stated, among other things, "I am very hopeful that we

will have a final decision on how to proceed with these claims for refund in the near future but until such time I will not be able to decide the individual claim of Community Federal Savings and Loan."

24. William A. Stark, Community Federal's senior vice president and controller, was principal coordinator of Community Federal's efforts to obtain a refund of the intangible taxes. He did not receive a copy of Respondent's final decisions concerning Citizens and Plaza until December 23, 1982. He received a copy of Respondent's final decision concerning Crystal City on December 24, 1982. He received Respondent's final decision concerning Community Federal between December 23, 1982, and December 30, 1982. He attempted to ascertain where the final decisions had been prior to arriving at his desk, but he could not. Community Federal's office complex occupies seven floors in a building of approximately 300,000 square feet where 484 employees work. Stark was out of his office on approximately five working days between November 23, 1982, and December 23, 1982. Failure of the final decisions to arrive at Stark's desk prior to December 23, 1982, was apparently due to accidental misrouting by Community Federal personnel. Respondent's final decisions were not addressed to any specific individual, only to organizations.

Conclusions of Law

I. Jurisdiction

This Commission has jurisdiction over this matter. Petitioners challenge a final decision of the Director of Revenue pursuant to Section 161.273, RSMo 1978.

II. Motion to Dismiss for Untimely Filing

Pending in the case is Respondent's Motion to Dismiss for Untimely Filing of Appeal. Respondent contends that Community Federal failed to meet the 30-day time limit set by Section 161.273, RSMo 1978, for the filing of a complaint with this Commission. Respondent sent his final decision concerning Community Federal to Community Federal by certified mail on November 23, 1982. Community Federal filed its complaint with this Commission on January 19, 1983, 57 days after Respondent's mailing.

Section 161.273 provided in pertinent part:

> Except as otherwise provided by law, any person or entity shall have the right to appeal to the administrative hearing commission from any finding, order, decision, assessment or additional assessment made by the director of revenue. Any person or entity who is a party to such a dispute shall be entitled to a hearing before the administrative hearing commission by the filing of a petition with the administrative hearing commission thirty days after the mailing or delivery of a decision by the director of revenue with respect to such dispute.

Failure to meet the 30-day time limit denies this Commission jurisdiction to consider a petitioner's complaint. *Springfield Park Central Hospital v. Director of Revenue*, 643 S.W.2d 599 (Mo. 1983); *Randles v. Schaffner*, 485 S.W.2d 1 (Mo. 1972); and *Cardinal Glennon Memorial Hospital Coffee Shop v. Director of Revenue*, 624 S.W.2d 115 (Mo.App. 1981).

Community Federal counters that its claim for a refund was consolidated with the other Petitioners' claims

so that its claim was not final until December 22, 1982. It further argues that Respondent's final decision signed by Respondent's general counsel cannot be deemed to be the director's final decision because the director must exercise his personal discretion and cannot delegate his authority to do so. Even if he could, Petitioners argue, such delegation would be unlawful unless it was effectuated pursuant to a rule or regulation. Community Federal finally argues that even if its appeal was not timely filed, its delay was caused by excusable neglect, and its appeal should not be dismissed.

A. Excusable Neglect

We consider Community Federal's final argument first because we reject it out of hand. We find nothing in Section 161.273 or in the case law construing the statute to support Community Federal's position. We deem the statute to authorize nothing more than our counting the number of days between mailing or delivery of Respondent's final decision and the filing of a complaint with this Commission. We find no authorization to consider the reasons a petitioner misses the 30-day time limit. This Commission, being created by statute, is restricted to providing only remedies authorized by statute. Without considering whether or not Community Federal's failure to meet the time limit was in fact "excusable neglect," we dismiss the argument.

B. Consolidated Claim

Community Federal argues that it did not miss the 30-day time limit because it had acquired by merger three other savings and loan associations which also had made

refund claims to Respondent. It contends that with each merger, the refund claims of the merging association became a portion of Community Federal's refund claim; therefore, Community Federal's claim was not final until December 22, 1982, when Respondent issued the last of the final decisions involving the Petitioners.

Community Federal rests part of its assertion on a belief that Respondent treated Petitioners' claims as a single claim. This belief is based on the October 26, 1982, letter of Respondent's general counsel. We find the letter to be inconclusive as to whether or not Respondent believed the claims to be a single one.

Nonetheless, it should have been readily apparent to Petitioner after Respondent issued the final decisions in parcelled fashion that it was not treating them as a single claim. Community Federal could have taken steps to protect itself but for the mishandling of the final decisions by its personnel. William Stark candidly admits that it was this mishandling, not an expectation of more claims to come, which caused Community Federal to miss the 30-day deadline.

Because the claims for refunds were made by separate entities, they were separate causes of action. Had the Respondent issued final decisions for each of the years in question for Community Federal, each would have become a separate cause of action for which the 30-day time period would have begun running. The same is true in this case. Each claim being a separate cause of action, initiated as such by the parties, the 30-days began running as soon as Respondent's action on each was final. Respondent's action on Community Federal's cause action was final on November 22, 1982. Respon-

dent mailed the final decision to Community Federal on November 23, 1982; hence, December 23, 1982, was the last day on which Community Federal could have invoked this Commission's jurisdiction. Having failed to do so, its complaint as to Respondent's action concerning its request for refund is hereby dismissed.

D. Delegation

Community Federal argues in the alternative that Respondent has not made a final decision in this case because the document purporting to be the Respondent's decision was signed by Respondent's general counsel, and this was an unlawful delegation. The argument is without merit. Respondent delegated authority to his general counsel to issue the final decisions. No regulation was needed for such delegation. *See Brown Group, Inc. v. Administrative Hearing Commission*, 649 S.W.2d 874 (Mo. banc 1983).

III. Standing

Respondent contends that the remaining four Petitioners do not have standing in this case because the intangible tax imposed by Section 148.480 is imposed on individual account holders, not the Petitioners. The statute states in pertinent part:

> There is hereby imposed upon each person, either natural or corporate, holding personally or in trust, an account in an association, an annual tax of two percent of the taxable portion of the earnings, including dividends and interest, paid or credited by such association to such account in the preceding year.

Section 148.500.1 provides:

> The association shall compute, withhold and pay to the director of revenue on or before the fifteenth day of April of each year, the amounts of all taxes imposed hereby upon its members by sections 148.470 to 148.530, the payment to be made in one remittance, and the association at its option may absorb the taxes without charging the same to the particular accounts.

Respondent argues that the Petitioners are "simply a conduit which collects and remits the amounts due from the taxpayers." Respondent's Brief at 30. As such, Respondent argues, Petitioners do not have standing to claim a refund of the taxes.

We disagree. As a general rule, the proper Petitioner in an action to recover taxes paid is the person or entity ultimately entitled to the money if it is recovered. *See State ex rel. Wyatt v. Cantley,* 26 S.W.2d 976 (Mo. banc 1930). Because Chapter 148 made the Petitioners legally responsible for paying the tax, they are the real parties in interest in these refund actions. *See Norwin G. Heimos Greenhouse, Inc. v. Director of Revenue,* 724 S.W.2d 505 (Mo. banc 1987).

IV. Validity of Claim for Refund

This case is controlled by the doctrine of sovereign immunity. The state, as the sovereign, cannot be sued without its "express consent . . . ." *Gas Service Company v. Morris,* 353 S.W.2d 645, 648 (Mo. 1962). Petitioners assert that Section 136.035 provides that consent. Subsection 2 states:

> The director of revenue shall refund any overpayment or erroneous payment of any tax on intan-

gible personal property and the amount refunded shall be charged against the next apportionment to the political subdivision which was the residence or situs of the taxpayer at the time the tax was paid.

Petitioners argue that "overpayment" in Section 136.035.2 should be construed to include payment of a tax declared unconstitutional. We agree that in many cases "overpayment" should be construed in this way, but it is not a universal construction to be applied wherever the term appears. In the context of Section 136.035.2 we conclude that it should not be construed as Petitioner urges.[1]

We construe Section 136.035.2 with sensitivity to the Supreme Court's instruction to construe such a statute "strictly." *Gas Service Company,* supra at 649. The court also has instructed that "refund of taxes illegally exacted is ordinarily a matter of governmental grace" and is to be "discourage[d] . . . ." *State ex rel. S. S. Kresge Company v. Howard,* 208 S.W.2d 247, 250 (Mo. banc 1947).

When we compare the provisions of Section 136.035.1 with those of Section 136.035.2, we note a significant dif-

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1. An amicus has urged us to avoid construing Section 136.035 because it is unambiguous. The amicus urges us to simply apply the "plain dictionary meaning" of the statute's words. This commissioner joins Judge Clifford of the Supreme Court of New Jersey in observing "that for me, the meaning of taxing statutes does not always leap off the page . . . . So much of the blame for that regrettable circumstance as does not repose in my own shortcomings may inhere in the very nature of the subject." *International Flavors and Fragrances, Inc. v. Director, Division of Taxation, Department of Treasury,* 507 A.2d 700, 706 (1985). My frustration with being unable to heed the amicus' urgings is somewhat alleviated by the court's conclusion in *Gas Service Company,* supra at 649, that "[t]he language [of Section 136.035], unexplained, constitutes an ambiguous reference but does not constitute a clear and unequivocal consent by the state to be sued . . . ."

ference. Section 136.035.1 provides for refund of an overpayment "of any tax which the state is authorized to collect." Those refunds are to be made from a fund appropriated by the General Assembly for that purpose. Section 136.035.2, on the other hand, provides for refund of an overpayment "of any tax on intangible property . . ." and provides a notably different method of funding refunds. The refunds are not to be made from a specially appropriated fund, but from "the next apportionment" of the intangible tax. When a tax is declared unconstitutional and payments stop, there will not be a "next apportionment." We conclude, therefore, that while overpayment may include payments of unconstitutional taxes in some contexts, the General Assembly did not contemplate refunds in such cases when it enacted Section 136.035.2. This causes us to conclude that the General Assembly did not consent to suit for refund of payments of unconstitutional taxes and that Respondent properly denied Petitioners' claims.

Decision

It is, therefore, the decision of this Commission that Respondent's refusal of Petitioners' claims for refund in this case be hereby affirmed. Further, Community Federal's complaint is dismissed for untimely filing.

SO ORDERED this 20th day of July, 1987.

/s/ Paul M. Spinden
Paul M. Spinden
Commissioner

REV. STAT. MO. (1978)

161.273. Administrative hearing commission to hear appeals from director of revenue—procedures—interest—burden of proof.—Except as otherwise provided by law, any person or entity shall have the right to appeal to the administrative hearing commission from any finding, order, decision, assessment or additional assessment made by the director of revenue. Any person or entity who is a party to such a dispute shall be entitled to a hearing before the administrative hearing commission by the filing of a petition with the administrative hearing commission within thirty days after the mailing or delivery of a decision of the director of revenue with respect to such dispute. The procedures applicable to the processing of such hearings and determinations shall be those established by chapter 536, RSMo. The administrative hearing commission shall maintain a transcript of all testimony and proceedings in hearings governed by this section, and copies thereof shall be made available to any interested person upon the payment of a fee which shall in no case exceed the reasonable cost of preparation and supply. Decisions of the administrative hearing commission under this section shall be binding subject to appeal by either party. In the event the taxpayer prevails in any dispute under this section, interest shall be allowed at the rate of six percent per annum upon the amount found to have been wrongfully collected or erroneously paid. In any proceeding before the administrative hearing commission under this section the burden of proof shall be on the taxpayer except for the following issues, as to which the burden of proof shall be on the director of revenue:

(1) Whether the taxpayer has been guilty of fraud with attempt to evade tax;

(2) Whether the petitioner is liable as the transferee of property of a taxpayer (but not to show that the taxpayer was liable for the tax); and

(3) Whether the taxpayer is liable for any increase in a deficiency where such increase is asserted initially after the notice of deficiency was mailed and a protest filed, unless such increase in deficiency is the result of a change or correction of federal taxable income required to be reported by the taxpayer, and of which change or correction the director of revenue had no notice or knowledge at the time he mailed the notice of deficiency.

REV. STAT. MO. (1986)

621.050. Administrative hearing commission to hear appeals from director of revenue—procedures—interest—burden of proof

1. Except as otherwise provided by law, any person or entity shall have the right to appeal to the administrative hearing commission from any finding, order, decision, assessment or additional assessment made by the director of revenue. Any person or entity who is a party to such a dispute shall be entitled to a hearing before the administrative hearing commission by the filing of a petition with the administrative hearing commission within thirty days after the decision of the director is placed in the United States mail or within thirty days after the decision is delivered, whichever is earlier. The decision of the director of revenue shall contain a notice of the right of appeal in substantially the following language:

If you were adversely affected by this decision, you may appeal to the administrative hearing commission. To appeal, you must file a petition with the administrative hearing commission within thirty days after the date this decision was mailed or the date it was delivered, whichever date was earlier. If any such petition is sent by registered mail, it will be deemed filed on the date it is mailed; if it is sent by any method other than registered mail, it will be deemed filed on the date it is received by the commission.

2. The procedures applicable to the processing of such hearings and determinations shall be those estab-

lished by chapter 536, RSMo. The administrative hearing commission shall maintain a transcript of all testimony and proceedings in hearings governed by this section, and copies thereof shall be made available to any interested person upon the payment of a fee which shall in no case exceed the reasonable cost of preparation and supply. Decisions of the administrative hearing commission under this section shall be binding subject to appeal by either party. In the event the taxpayer prevails in any dispute under this section, interest shall be allowed at the rate of six percent per annum upon the amount found to have been wrongfully collected or erroneously paid except for taxes paid under protest and held by the director in a special deposit which shall be paid as specified by section 144.700, RSMo. In any proceeding before the administrative hearing commission under this section the burden of proof shall be on the taxpayer except for the following issues, as to which the burden of proof shall be on the director of revenue:

(1) Whether the taxpayer has been guilty of fraud with attempt to evade tax;

(2) Whether the petitioner is liable as the transferee of property of a taxpayer (but not to show that the taxpayer was liable for the tax); and

(3) Whether the taxpayer is liable for any increase in a deficiency where such increase is asserted initially after the notice of deficiency was mailed and a protest filed, unless such increase in deficiency is the result of a change or correction of federal taxable income required to be reported by the taxpayer, and of which change or correction the director of revenue had no notice or knowledge at the time he mailed the notice of deficiency.

REV. STAT. MO. (1986)

536.090. Decisions in writing—notice

Every decision and order in a contested case shall be in writing, and, except in default cases or cases disposed of by stipulation, consent order or agreed settlement, the decision, including orders refusing licenses, shall include or be accompanied by findings of fact and conclusions of law. The findings of fact shall be stated separately from the conclusions of law and shall include a concise statement of the findings on which the agency bases its order. Immediately upon deciding any contested case the agency shall give written notice of its decision by delivering or mailing such notice to each party, or his attorney of record, and shall upon request furnish him with a copy of the decision, order, and findings of fact and conclusions of law.